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Sales - Contributory Negligence - Use as a Defense in Action for Breach of Implied Warranty

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SALES—CONTRIBUTORY NEGLIGENCE—USE AS A DEFENSE IN ACTION FOR BREACH OF IMPLIED WARRANTY—Defendant installed an oil burner in plaintiff's apartment building. The burner failed to function properly and exploded two months after installation. There was no evidence that the furnace was repaired subsequent to the explosion. Plaintiff continued to use the furnace for four years until a second explosion caused considerable damage to the building. Upon inspection, the cause of the explosions was found to be a defective system of heating and piping the oil. Plaintiff brought this action for breach of implied warranty to install the furnace in a good and workmanlike manner and recovered consequential damages. On appeal, *held,* reversed. It was error to refuse to submit the issue of contributory negligence to the jury. In an action based on implied warranty, the contributory negligence of the buyer is a defense to a claim for consequential damages. *Nelson v. Anderson,* (Minn. 1955) 72 N.W. (2d) 861.

Historically, warranty was based on tort,[1] but the prevailing view today is that a suit for breach of implied warranty is a contract action.[2] It is also a form of strict liability and a complaint for breach of warranty need not allege negligence on the part of the seller.[3] Logically, it should follow that contributory negligence is unavailable as a defense.[4] However, there is authority for the use of tort concepts in the warranty field and, particularly, for the use of contributory negligence as a defense to the buyer's claim for consequential damages. This authority is generally found in express warranty cases,[5] and, to a more limited extent, in those implied warranty cases where personal injury has resulted from the breach of warranty.[6] In the former instance the courts analogize the wrong to a negligent misrepresentation,[7] and in the latter situation to the tort of trespass to the person.[8] Some courts, moreover, apparently combine the principles of both tort and contract to reach a decision.[9] Though courts may differ as to whether implied warranty is contract or tort, there is

1 See Prosser, "The Implied Warranty of Merchantable Quality," 27 MINN. L. REV. 117 (1943); Ames, "History of Assumpsit," 2 HARV. L. REV. 1 (1888).

2 E.g.: Simon v. Graham Bakery, 17 N.J. 525, 111 A. (2d) 884 (1955); Wells v. Oldsmobile Co., 147 Ore. 687, 35 P. (2d) 232 (1934); Huddleston v. Lee, (Tenn. App. 1955) 284 S.W. (2d) 705.

3 Basin Oil Co. v. Baash-Ross Tool Co., 125 Cal. App. (2d) 578, 271 P. (2d) 122 (1954).

4 Challis v. Hartloff, 136 Kan. 823, 18 P. (2d) 199 (1933); Vaningan v. Mueller, 208 Wis. 527, 243 N.W. 419 (1932).

5 Huddleston v. Lee, note 2 supra; Razey v. J. B. Colt Co., 106 App. Div. 103, 94 N.Y.S. 59 (1905); Ellen v. Heacock, 247 App. Div. 476, 286 N.Y.S. 740 (1936).

6 Madeiros v. Coca-Cola Bottling Co., 57 Cal. App. (2d) 707, 135 P. (2d) 676 (1943); Merrimac Chemical Co. v. American Tool and Machine Co., 192 Mass. 206, 78 N.E. 419 (1906).

7 Dalrymple v. Sinkoe, 230 N.C. 453, 53 S.E. (2d) 437 (1949).

8 Knapp v. Willys-Ardmore, Inc., 174 Pa. Super. 90, 100 A. (2d) 105 (1953).

9 Missouri Bag Co. v. Chemical Delinting Co., 214 Miss. 13, 58 S. (2d) 71 (1952); Barber Mining and Fertilizing Co. v. Brown Hoisting Machinery Co., (6th Cir. 1919) 258 F. 1.

apparently no reason to prefer one interpretation over the other. Usually the buyer can recover ordinary damages and those consequential damages that are the natural results of the breach,[10] but when, as in the principal case, the buyer continues to use goods known to be defective, the damages caused after the defect is known are not considered natural consequences and both theories preclude recovery.[11] Under tort law the buyer is denied recovery on the basis of contributory negligence.[12] If a contract theory is used, he cannot recover either because (1) he has failed to mitigate his damages by returning or repairing the defective goods,[13] or (2) he has waived his right to consequential damages by continuing to use them[14] or, (3) it was not contemplated by the parties that the buyer would use goods known to be defective.[15] It does, however, make a difference what view is taken when the buyer claims only those damages that are usually recoverable.[16] But even here it is not prudent for the courts to use one process of reasoning in all situations. Both methods have their advantages; the tort view makes the wrongful death acts[17] and a more liberal measure of damages[18] available, whereas the contract theory usually gives the advantage of a longer statute of limitations.[19] An adoption of one viewpoint would cause the advantages of the other to be lost. Thus, courts may shift from one interpretation of warranty to the other, depending on the facts of the case before them, in order to gain the advantages of the doctrine they need to do justice between the parties.[20] This seems unnecessarily confusing. But, on the other hand, to have the courts adhere to one or the other theory of warranty just for the sake of uniformity may well result in injustice.[21] The best and possibly only solution to the question of whether warranty is a contract or a tort action is to regard it as a combina-

10 McLachlan v. Wilmington Dry Goods Co., 41 Del. 378, 22 A. (2d) 851 (1941).

11 Unless the buyer is held to have accepted the goods or failed to give notice of the breach in a reasonable time, he does not lose his right to recover for ordinary damages and those consequential damages that naturally result from the breach. Mallery v. Northfield Seed Co., 196 Minn. 129, 264 N.W. 573 (1936).

12 Finks v. Viking Refrigerators, Inc., 235 Mo. App. 679, 147 S.W. (2d) 124 (1941).

13 Henley v. Sears-Roebuck and Co., 84 Ga. App. 723, 67 S.E. (2d) 171 (1951).

14 Coleman v. Carter, (Idaho 1955) 289 P. (2d) 932.

15 Pauls Valley Mill Co. v. Gabbert, 182 Okla. 500, 78 P. (2d) 685 (1938).

16 See note 11 supra.

17 Greco v. S. S. Kresge Co., 277 N.Y. 26, 12 N.E. (2d) 557 (1938).

18 In Madeiros v. Coca-Cola Bottling Co., note 6 supra, plaintiff recovered on a tort theory for damages which were proximate to the breach, but, because such damages were not contemplated by the parties, they would have been denied by use of contract law.

19 Blessington v. McCrory Stores Corp., 305 N.Y. 140, 111 N.E. (2d) 421 (1953). See 21 IND. L. J. 23 (1945), for a complete survey of the state statutes of limitations.

20 See Prosser, "The Implied Warranty of Merchantable Quality," 27 MINN. L. REV. 117 (1943); Amram and Goodman, "Some Problems in the Law of Implied Warranty," 3 SYRACUSE L. REV. 259 (1952).

21 In Whitely v. Webb's City, Inc., (Fla. 1951) 55 S. (2d) 730, warranty was considered as based on contract with the result that the buyer's heirs were denied recovery under a wrongful death act. In Rubino v. Utah Canning Co., 123 Cal. App. (2d) 18, 266 P. (2d) 163 (1954), the shorter tort statute of limitations was applied and the buyer's cause of action barred.

tion of both.[22] Warranty is in the shadowland between contract and tort,[23] and concepts of both are applicable to it. Thus, it should be regarded simply as warranty and not bound by the rigid forms of either contract or tort, but having some of the attributes of both. Further confusion among the courts would thus be avoided and such defenses and measures of damages could be used as might be needed to do justice between the litigants. Under this view, the Minnesota court's application of contributory negligence as a defense to breach of implied warranty would be valid. The only criticism of the decision is not that the court classified implied warranty as tort, contrary to the majority view, but that it attempted to classify warranty at all.

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22 1 WILLISTON, SALES, rev. ed., §197, at p. 507 (1948), terms warranty as quasi-contract and quasi-tort.

23 Greco v. S. S. Kresge Co., note 17 supra.